

EXHIBIT D



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE

February 1, 2019

Via Electronic Mail

Daniel Toal
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
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Re: *People of the State of New York v. Exxon Mobil Corporation*, Index No.
452044/2018 (Sup. Ct. N.Y. Cnty.)

Dear Daniel:

On behalf of the Office of the Attorney General ("OAG"), we write to respond to Exxon Mobil Corporation's ("Exxon") letter of January 25, 2019 regarding the OAG's Responses and Objections ("R&Os") to Exxon's discovery requests and our initial meet and confer on January 30th. We propose another meet and confer on Tuesday or Wednesday next week after you have had an opportunity to review this letter and our revised responses.

Before responding to the specific issues raised in your letter, we want to clarify what we have produced to date. Several of the alleged "deficiencies" Exxon has identified in the OAG's R&Os appears to be predicated on the assumption that documents have been withheld from prior productions on privilege grounds. That is not the case. In an effort to provide Exxon with responsive documents in a timely manner, our productions thus far comprised documents related to third-party subpoenas and publicly-available reports, neither of which required privilege review. Consequently, we have not withheld any documents from those productions on privilege grounds. As we made clear in our responses, however, we intend to continue producing responsive documents on a rolling basis. To the extent that we withhold responsive documents from any future productions, we will of course provide a privilege log pursuant to Exxon pursuant to CPLR 3122(b) and Commercial Division Rule 11-b, and we are amenable to providing updates to the log on a reasonable rolling basis.

I. Compliance with CPLR 3122(b) and Commercial Division Rule 11e(b).

Exxon appears to conflate the rules for responses to discovery requests set forth in CPLR 3122(a) and Commercial Division Rule 11-e with the rules governing privilege logs set forth in CPLR 3122(b) and Commercial Division Rule 11-b. *See Kimmel v. State*, 286 A.D.2d 881, 883 (4th Dep't 2001) (citing CPLR 3122 (a), (b) and noting that "privileges need not be raised within 20 days of service of a notice for discovery"). Discovery responses under 3122(a) are intended to notify the requesting party of whether or not the responding party agrees to produce information in response to the requests and provide the bases for any objections to the request. *See, e.g., S.K.I. Wholesale Beer Corp. v Smuttynose Brewing Co., Inc.*, 2018 N.Y. Misc. LEXIS 4099, *4 (N.Y. Sup. Ct., Kings Cty., Sept. 13, 2018).

The OAG's R&Os thus provided the requisite notification, indicating its position that the 26 documents requests cited in your letter were improper because they called for information that is not relevant to the issues in the case. *See, e.g., Kimmel*, 286 A.D.2d at [] ("A disclosure demand may be 'palpably improper' when it seeks material that is irrelevant to the issue in controversy.") (citing *Duhe v. Midence*, 1 AD3d 279, 280 (1st Dep't 2003)). While we continue to dispute the relevance of the information called for by all of these requests, in the spirit of compromise, the OAG will agree to produce third-party communications relating to the allegations in the Complaint in response to certain of Exxon's document requests. We are still struggling, however, to understand what type of third-party communications Exxon believes are relevant to the allegations in the Complaint (as opposed to being relevant only to Exxon's allegations of bad faith). We thus propose that, during a meet and confer next week, Exxon explain the types of third-party communications that it is seeking and its view on how such communications relate to the allegations in the Complaint. In anticipation of our agreement to provide some of the communications sought by Exxon, we have provided amended R&Os and lists of proposed custodians and search terms in accompaniment to this letter. Also, to address your professed confusion caused by the styling of our previous R&Os, we have provided additional language in the amended R&Os to indicate which requests the OAG deems improper and does not intend to produce documents in response to.

As our amended R&Os indicate, the OAG stands by its position that discovery pertaining to Exxon's allegations of prosecutorial misconduct is palpably improper. Courts have repeatedly held that that the personal viewpoints or motivations of prosecutors are irrelevant to proving or disproving the allegations in the Complaint. *See Yaselli v. Goff*, 12 F.2d 396, 407 (2d Cir. 1926) (explaining why prosecutors "shall be free and fearless to act in the discharge of [their] official duties"); *see also United States v. Armstrong*, 517 U.S. 546, 468 (1996) (noting the "rigorous standard" for selective-prosecution claims and discovery in aid thereof). As the Appellate Division has observed, allowing a defendant like Exxon to pursue such a defense could preclude valid legal claims brought on behalf of New Yorkers and risk enabling "fraud on a massive scale." *A.C. Trans. Inc. v. Board of Educ. Of City of N.Y.*, 253 A.D.2d 330, 337 (1st Dep't 1999) (affirming dismissal of equitable defenses). In an effort to avoid burdening the Court with this issue, we propose revisiting this issue during the next meet and confer. If we are unable to resolve our differences, we reserve the right to petition the Court for appropriate relief.

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II. *Privilege Objections*

As explained above, the OAG has yet to withhold any documents on privilege grounds and will produce a privilege log in compliance with CPLR 3122(b) at the appropriate time. Accordingly, any discussion of the applicability of any particular privilege doctrine is premature. Exxon will have ample opportunity to challenge any specific OAG privilege determinations.

For clarity, we do not intend to review nor log OAG internal communications. As courts have noted, the burden associated with responding on a document-by-document basis to wholesale requests for documents that are ordinarily covered by the work-product rule and other privilege doctrines is almost never justified. *See e.g., SEC v. Thrasher*, 1996 U.S. Dist. LEXIS 3327, *3-4, (S.D.N.Y. Mar. 19, 1996) (finding a privilege log unnecessary where the plaintiff requested communications between defense counsel regarding the lawsuit, as they were “very probably” protected “by the attorney-client privilege”).

III. *Objections Based on Res Judicata and Collateral Estoppel*

Exxon’s interpretation of the OAG’s citation to Judge Caproni’s ruling is incorrect. The OAG made no reference to the doctrines of res judicata or collateral estoppel and did not suggest that the discovery requests at issue were barred by either doctrine. Instead, the OAG objected to the requests as concerning “legally defective” accusations. The OAG cited Judge Caproni’s ruling for an explanation of this objection, which as described above, is based on the impropriety of Exxon’s allegations of prosecutorial misconduct. While the OAG reserves its rights to raise arguments based on res judicata or collateral estoppel in at a later date, the case law cited by Exxon is not implicated by the objections in the OAG’s R&Os.

IV. *Document Hold Notice*

In response to your query at our meet and confer, we can represent that OAG has complied with its preservation obligations, and issued a preservation notice on April 21st, 2016. On our call, you stated that Exxon has disclosed its hold notice, but we have not been able to locate that notice. In fact, in a letter dated May 3, 2017, Exxon took the position that a request for the “content” of litigation hold notices was improper because the “information is protected by work product doctrine and attorney-client privilege.” (May 3, 2017 Letter to Oleske, fn. 1 (citing *Capitano v. Ford Motor Co.*, 813 N.Y.S.2d 687, 688 (Sup. Ct. 2007))). Consistent with Exxon’s approach we will not be disclosing the content of our notice.

V. *Third Party Communications*

As stated, the OAG, while disputing the relevance of OAG communications to the question of whether or not Exxon misled its shareholders, will agree to produce some third-party communications relating to the allegations in the Complaint. As this concession requires additional investigation and review, we will appropriately supplement our response to Interrogatory 1 of Defendant’s Second Set of Interrogatories at the appropriate time.

Addressing your objection to the OAG’s response to Request No. 4 in Exxon’s first RFP, I once again direct you to your letter of May 3, 2017. In that letter you took the

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position that the “content” of custodial interviews conducted by Exxon’s law department constitutes “the mental impressions of counsel, which are protected by the work product doctrine and attorney-client privilege.” (May 3, 2017 Letter to Oleske, fn. 2 (citing *Smith v. City of New York*, 854 N.Y.S.2d 44, 45 (1st Dep’t 2008); *Corcoran v. Peat, Marwick, Mitchell & Co.*, 542 N.Y.S.2d 642, 643 (1st Dep’t 1989); *Rossi v. Blue Cross & Blue Shield*, 528 N.Y.S.2d 51, 53 (1st Dep’t 1988))). Here again, the OAG will respond in accordance with the approach taken by Exxon and log any interview notes or memoranda in accordance with CPLR 3122(b) and Commercial Division Rule 11-b.

Finally, as indicated on our meet and confer, we are prepared to move forward with a review of external communications. We have provided below the proposed date range, custodians and search terms and would be happy to discuss these further on our next meet and confer so we can commence the review.

Date range: August 4, 2015 to filing of complaint

Proposed Custodians:

1. Eric Schneiderman, Attorney General
2. Micah Lasher, Chief of Staff
3. Brian Mahanna, Chief of Staff
4. Manisha Sheth, Executive Deputy Attorney General
5. John Oleske, Senior Enforcement Counsel
6. Lem Srolovic, Environmental Protection Bureau Chief
7. Katherine Milgram, Investor Protection Bureau Chief
8. Jonathan Zweig, Assistant Attorney General
9. Mandy DeRoche, Assistant Attorney General

Proposed Search terms:

1. Exxon
2. XOM
3. ExxonMobil
4. carbon or CO2! or C02!
5. GHG
6. greenhouse

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7. methane or CH4
8. emission! or emit!
9. strand! w/5 (asset! or reserve! or resource!)
10. (proxy or implied or shadow) w/3 (cost! or pric! or valu! or fee! or tax!)
11. “climate change”

* * *

Please let us know at your earliest convenience whether you are available for a meet and confer next week.

Sincerely,

/s Marc Montgomery

Marc Montgomery

Enclosures:

Plaintiff’s Amended Response and Objections to Defendant’s First Request for the Production of Documents

Plaintiff’s Amended Response and Objections to Defendant’s Third Request for the Production of Documents